

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NABEEL NAIEM SLAIEH and
JOANNE FRALEIGH,

Plaintiffs,

v.

LARRY D. SIMONS,

Defendant.

Case No.: CV 17-1404-AB (FFMx)

**ORDER AFFIRMING
BANKRUPTCY COURT'S
DISMISSAL OF APPELLANT'S
COUNTERCLAIMS [9]**

Before the Court is Appellants Nabeel Naiem Slaieh and Joanne Fraleigh's ("Appellants") appeal from the bankruptcy court's June 28, 2017 order granting with prejudice Defendant Larry D. Simons's Motion to Dismiss. (Dkt. No. 9; *see also* Defendant's Excerpts of Record ("DER") Ex. 177.) Having reviewed the parties' briefing and the record before the bankruptcy court, the June 28, 2017 order is **AFFIRMED.**

I. BACKGROUND

Appellant, the debtor in the underlying bankruptcy proceeding, filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code on December 18, 2013. (DER Ex. 22.) That same day, the bankruptcy court appointed Larry D.

1 Simons as Chapter 7 trustee (“Trustee”) of Appellant’s Estate. Among the assets in
2 Appellant’s bankruptcy Estate was his principal residence located at 40834 Baccarat
3 Road, Temecula, California (the “Property”). (DER Ex. 22 at 35.)

4 Pursuant to his statutory duties to liquidate assets of the Estate, the Trustee
5 marketed the Property for sale. *See* 11 U.S.C. § 704(a)(1). A buyer was found, and
6 on April 6, 2016, the Trustee filed a Sale Motion with the bankruptcy court, seeking
7 authority to sell the property for \$635,000. (DER Ex. 97 at 3,512–3,898.) The
8 bankruptcy court entered an order granting the Sale Motion on May 26, 2016. (DER
9 Ex. 129 at 4,689–93.) Appellant appealed the Sale Order to the United States District
10 Court and filed a motion to stay the case pending appeal in both the district court and
11 the bankruptcy court. Both motions to stay were denied. (DER Exs. 137, 146.) The
12 appeal of the Sale Order was later dismissed for failure to prosecute.

13 On July 13, 2016, the United States Marshals Service posted a notice to vacate
14 at the Property, instructing all occupants to vacate by July 20, 2016, at 12 p.m. (DER
15 Ex. 148 at 7,058.) On July 19, 2016, Ms. Fraleigh, Appellant’s wife, filed a complaint
16 in the Superior Court of California, County of Riverside, for quiet title, declaratory
17 and injunctive relief, and violation of California Business and Professions Code
18 section 17200 et seq. (DER Ex. 148 at 7,022–7,124.) She also sought a temporary
19 stay of the eviction proceedings. (*Id.*) Ms. Fraleigh claimed that the sale could not
20 proceed because Appellant transferred the Property to her via interspousal transfer
21 deed, recorded on or about May 11, 2016. (*Id.* at 7,055–56.) In opposition, Trustee
22 argued that this purported transfer was without the bankruptcy court’s approval, and
23 constituted an unauthorized post-petition transfer under 11 U.S.C. § 549. However,
24 over the Trustee’s objection, the state court entered a temporary stay of eviction. (*Id.*
25 at 7,122.) The Trustee then removed the action to the bankruptcy court and filed an
26 emergency motion to dissolve the temporary stay, which was granted on July 21,
27 2016. (DER Ex. 147 at 7,012–21; Ex. 150 at 7,254–55.)
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1 Appellant and his family were subsequently evicted from the Property. Upon
2 eviction, the Trustee discovered that various doors and windows had been removed
3 from the Property; Appellant and Ms. Fraleigh were asked to return these items since
4 they were part of the bankruptcy Estate and part of the realty being sold pursuant to
5 the Sale Order. Appellant claims he and Ms. Fraleigh were not involved in the
6 removal of these fixtures.

7 On August 23, 2016, the bankruptcy court issued an Order to Show Cause as to
8 why Ms. Fraleigh and her attorney, Mr. Saba—who is also Appellant’s attorney in the
9 bankruptcy proceeding—should not be held in contempt for knowingly and willfully
10 violating the automatic stay with their state court filings. (*See* DER Ex. 156 at 7,373–
11 74.) After reviewing Ms. Fraleigh’s and Mr. Saba’s oppositions to the Order to Show
12 Cause, the court determined sanctions were appropriate. The court imposed a fine of
13 \$39,205.49 and dismissed the state court action. (DER Ex. 158 at 7,387–95.)

14 On August 31, 2016, Trustee filed a Complaint against Appellant and Ms.
15 Fraleigh. (DER Ex. 159 at 7,424–7,942.) In the Complaint, Trustee seeks a judgment
16 for avoidance and recovery of the unauthorized post-petition transfers pursuant to 11
17 U.S.C. §§ 549, 550, 551. (*Id.*) The Trustee alleges that the interspousal transfer deed
18 was improper because it occurred post-petition without the bankruptcy court’s
19 approval or authorization. (*Id.*) In response, Appellant and Ms. Fraleigh filed a
20 motion to dismiss the Complaint for failure to state a claim. (*See Simons v. Slaieh*,
21 Adv. No. 6:16-ap-01224-MH, Dkt. No. 4.) Thereafter, Ms. Fraleigh withdrew her
22 initial motion to dismiss and filed a new motion alleging she was not personally
23 served with the Complaint. (*Id.* at Dkt. Nos. 7, 8.) The bankruptcy court denied both
24 Appellant’s and Ms. Fraleigh’s motions. (*See id.* at Dkt. Nos. 13, 16.)

25 On December 16, 2016, Appellant and Ms. Fraleigh filed their first counter
26 complaint against Trustee, alleging: (1) breach of contract; (2) fraud and deceit; (3)
27 extortion; (4) conversion; (5) defamation, slander *per se*; (6) negligence; (7) breach of
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1 fiduciary duties; (8) violation of California Business and Professions Code § 17200;
2 (9) intentional infliction of emotional distress; and, (11) wrongful eviction.
3 (Appellant’s Excerpts of Record (“AER”) Ex. 1.) Two factual scenarios appear to
4 form the basis of these claims. First, in May and June of 2016, counsel for Appellant
5 and Trustee allegedly engaged in negotiations regarding the sale of the Property.
6 According to Appellant, he offered to purchase the property for \$435,000 and Trustee
7 counter-offered to sell the property for \$635,000. (AER Ex. 1 at 3.) Appellant
8 contends he agreed to purchase the property for \$635,000. (*Id.*) Appellant further
9 argues that Trustee then refused to sell him the Property for that price and demanded
10 Ms. Fraleigh pay an additional \$75,000 “to teach her a lesson” for filing the state court
11 action discussed above. (*Id.*; *see also* DER Ex. 164 at 8,051.) The second situation
12 involved the enforcement of the bankruptcy court’s Sale Order. After Appellant’s
13 unsuccessful appeal of the Sale Order, an eviction notice was posted on the Property.
14 Following the determination of Ms. Fraleigh’s state court action, the United States
15 Marshals Service evicted Appellant and his family. According to Appellant, he was
16 given thirty minutes to collect personal property, and about a week later, obtained
17 permission to return and collect additional personal property. (*See* AER Ex. 1 at 7.)
18 When he returned, he realized certain expensive items were missing. However,
19 Appellant acknowledged that many doors and windows were missing prior to his
20 eviction. (*See id.*; *see also* DER Ex. 164 at 8,052–53.)

21 On January 17, 2017, Trustee moved to dismiss the first counter complaint
22 asserting, among other things, that he and his professionals are entitled to quasi-
23 judicial immunity for the acts alleged. (DER Ex. 159 at 7,396–8,002.) On January
24 18, 2017, Ms. Fraleigh voluntarily dismissed her counter complaint. (DER Ex. 164 at
25 8,050.) The court held a hearing on the motion on February 15, 2017. (*Simons v.*
26 *Slaieh*, Adv. No. 6:16-ap-01224-MH, Dkt. No. 35.) Thereafter, on February 24, 2017,
27 the court dismissed all of Appellant’s claims with prejudice, except for the fifth claim
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1 for defamation and slander *per se*, which was dismissed without prejudice. (DER Ex.
2 164.) The court held that all of Appellant’s claims were insufficiently pled, appellant
3 lacked standing to assert certain claims, and that Trustee and his professionals were
4 entitled to quasi-judicial immunity with regard to actions taken in relation to the sale
5 of the Property. (*Id.* at 8,055–63.) The court gave Appellant until March 7, 2017, to
6 file an amended counter complaint. (*See id.* at 8,048–71; Ex. 165 at 8,072–73.)
7 Appellant filed his amended counter claims on March 3, 2017, alleging separate
8 causes of action for slander, defamation, and intentional infliction of emotional
9 distress. (DER Ex. 166 at 8,633–44.) Trustee subsequently filed a motion to dismiss
10 the amended counterclaims, which the court granted on June 19, 2017. (DER Ex.
11 177.) In that order, the court explained that although Appellant had stated a *prima*
12 *facie* claim for slander, the claim was barred by the doctrine of quasi-judicial
13 immunity. (*Id.* at 8,753–55) Appellant’s defamation claim was dismissed for lack of
14 standing. As for Appellant’s intentional infliction of emotional distress claim, the
15 court noted it had already dismissed that claim with prejudice in the prior order. (*Id.*)

16 The bankruptcy court’s June 19 order forms the basis of the instant appeal;
17 however, Appellant’s Opening Brief also challenges the court’s dismissal of the
18 causes of action in Appellant’s original counter claim. (*See* Dkt. No. 9, Appellant’s
19 Opening Brief (“AOB”).) The Court will discuss each of the counterclaims in turn.

20 II. LEGAL STANDARD

21 District courts have jurisdiction to hear appeals from, *inter alia*, “final
22 judgments, order, and decrees” of the bankruptcy courts. 28 U.S.C. §158(a)(1); *see*
23 *also* Fed. R. Bankr. P. 8005. “When reviewing a decision of a bankruptcy court, a
24 district court functions as an appellate court and applies the standards of review
25 generally applied in federal courts of appeal.” *In re Guadarrama*, 284 B.R. 463, 468
26 (C.D. Cal. 2002).

27 Appellate courts review *de novo* the grant of a Rule 12(b)(6) motion to dismiss.
28

1 *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir.2005). “When ruling on a motion to
2 dismiss, we accept all factual allegations in the complaint as true and construe the
3 pleadings in the light most favorable to the nonmoving party.” *Id.* “To survive a
4 motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,
5 to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662,
6 677 (2009) (internal quotations omitted). “A claim has facial plausibility when the
7 plaintiff pleads factual content that allows the court to draw the reasonable inference
8 that the defendant is liable for the misconduct alleged.” *Id.*

9 The bankruptcy court’s conclusions of law regarding the immunity of a trustee
10 are also reviewed de novo, while findings of fact are reviewed for clear error. *In re*
11 *Jercich*, 238 F.3d 1202, 1205 (9th Cir. 2001).

12 The court generally may not consider materials other than facts alleged in the
13 complaint and documents that are made a part of the complaint. *Anderson v.*
14 *Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). However, a court may consider materials
15 if (1) the authenticity of the materials is not disputed and (2) the plaintiff has alleged
16 the existence of the materials in the complaint or the complaint “necessarily relies” on
17 the materials. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation
18 omitted). The court may also take judicial notice of undisputed facts that are
19 contained in extrinsic materials. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649
20 (9th Cir. 1988); *Lee*, 250 F.3d at 689–90.

21 **III. DISCUSSION**

22 **A. First Claim for Breach of Contract**

23 In his first claim, Appellant alleges that Trustee breached their contract for sale
24 when he refused to sell the Property to Appellant. The elements of breach of contract
25 are (1) the existence of a contract, (2) plaintiff’s performance or excuse for
26 nonperformance, (3) defendant’s breach, and (4) resulting damages to the Plaintiff.
27 *Oasis v. West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). Counsel for
28

1 Appellant and Trustee engaged in email correspondence regarding the sale of the
2 Property, and according to Appellant, the emails establish the existence of a contract.
3 (*See* AER Ex. 1 at 3–4.) The Court disagrees. The emails show numerous offers and
4 counteroffers but do not show acceptance by either party. (DER Ex. 159 at 7,970–
5 73.)¹ Thus, Appellant has failed to establish the first element of a breach of contract
6 claim: the existence of a contract.

7 Further, as the bankruptcy court noted, a bankruptcy trustee generally cannot
8 enter into a valid contract for sale of estate property without court approval. *See* 11
9 U.S.C. § 363(b)(1); *In re Smith*, 352 B.R. 500, 503 (Bankr. N.D. Ala. 2006) (holding
10 that since sale of debtor’s property was not within the ordinary course of business
11 trustee could not enter into an enforceable contract to sell it without court approval).
12 Here, a sale of Appellant’s real property would fall outside the ordinary course of
13 business, and would require court approval. It is undisputed that there was no
14 approval of the alleged contract to sell the Property to Appellant. Accordingly,
15 Appellant has not alleged the existence of a contract, and the court **AFFIRMS** the
16 dismissal of his first cause of action.

17 **B. Second Claim for Fraud and Deceit and Third Claim for Extortion**

18 Appellant’s second and third claims stem from certain interactions between
19 Trustee and Ms. Fraleigh. Trustee claims that Appellant lacks standing to assert these
20 claims because the alleged harm was to Ms. Fraleigh, not Appellant. (Dkt. No. 12,
21 Appellee’s Answering Brief (“AB”) at 14–15.) Standing is the threshold question in
22 every federal case, and a party generally cannot assert the claims of another. *Warth v.*
23 *Seldin*, 422 U.S. 490, 499 (1975). “A federal court’s jurisdiction therefore can be
24 invoked only when the plaintiff *himself* has suffered ‘some threatened or actual injury
25

26 ¹ The Court considered these exhibits because their authenticity is not disputed,
27 Appellant has alleged the existence of the emails in the amended cross complaint, and
28 the amended cross complaint necessarily relies on the emails to establish the contract.
See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)

1 resulting from the putatively illegal action.” *Id.* (quoting *Linda R.S. v. Richard D.*,
2 410 U.S. 614, 617 (1973)) (emphasis added).

3 In his claim for fraud and deceit, Appellant alleges that he and Ms. Fraleigh
4 were injured when Ms. Fraleigh “had to fly to Canada to liquidate whatever amount of
5 money in her bank accounts within which to purchase the Property.” (AER Ex. 1 at
6 5.) Although the factual allegations in the cross complaint refer to actions taken and
7 money spent by Ms. Fraleigh, Appellant argues in his Opening Brief that because the
8 couple was married, he has a legal right to claim the expenditure of her trip to Canada
9 as his own damages. (AOB at 15.)

10 Under California law, the “indispensable elements of a fraud claim include a
11 false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and
12 damages.” *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097 (9th Cir. 2003). A cause
13 of action for fraud “must be pled specifically; general and conclusory allegations do
14 not suffice.” *Lazar v. Superior Court*, 12 Cal. 4th 631, 645 (1996). “This
15 particularity requirement necessitates pleading *facts* which show how, when, where, to
16 whom, and by what means the representations were tendered.” *Stansfield v. Starkey*,
17 220 Cal. App. 3d 59, 73 (Ct. App. 1990) (emphasis added). Appellant must plead all
18 of the above requirements as to himself, even if he could ultimately claim he suffered
19 damages as a result of Ms. Fraleigh’s expenditure of community property. The cross
20 complaint specifically pleads that Ms. Fraleigh detrimentally relied on the alleged
21 fraudulent statements; there is no mention of Appellant’s detrimental reliance. (AER
22 Ex. 1 at 4.) Further, it is unclear from the pleadings how the alleged statement that
23 Trustee would sell the Property for \$635,000 was false. Indeed, the Court approved
24 the sale of the Property to another buyer for this amount. (*See* DER Ex. 97 at 3,554.)
25 Further, the cross complaint ambiguously states that Trustee “knowingly and
26 intentionally concealed the information” without explaining *what* information was
27 allegedly concealed. This does not satisfy the specificity requirements for pleading
28 fraud. Thus, the Court finds that Appellant’s fraud and deceit claim is insufficiently

1 pled, and **AFFIRMS** its dismissal.

2 Similarly, Trustee argues that appellant lacks standing to assert this third claim
3 for extortion. The amended cross complaint alleges that Trustee demanded *Ms.*
4 *Fraleigh* pay an additional \$75,000, and as a result, *she* has suffered damages. (AER
5 Ex. 1 at 6–7.) In his Opening Brief, Appellant does not address the bankruptcy
6 court’s ruling but merely states that Ms. Fraleigh dismissed her counter claim as a
7 result of alleged harassment and threats by Trustee. (AOB at 15–16.) There is no
8 evidence in the record that Trustee or his professionals harassed or threatened Ms.
9 Fraleigh. Further, even if there was, this does not explain why *Appellant* would be
10 permitted to assert this claim; he does not allege that he personally suffered an injury
11 from Trustee’s purported demand that Ms. Fraleigh pay an additional \$75,000 for the
12 Property. Accordingly, the Court **AFFIRMS** the dismissal of Appellant’s extortion
13 claim.

14 **C. Fourth Claim for Conversion**

15 In his cross complaint, Appellant states that he returned to his house
16 approximately one week after he was evicted, only to discover that certain expensive
17 items of personal property were missing. (AER Ex. 1 at 7.) Appellant argues that
18 Trustee “failed to ‘board up’ or replace the missing windows and doors to prevent
19 entry into the Debtor’s Property by outsiders.” (*Id.*) Accordingly, Appellant contends
20 that Trustee and his professionals intentionally interfered with his personal property,
21 and such interference deprived Appellant of possession and use of the property at
22 issue. (*Id.* at 8.)

23 The elements of conversion are (1) the plaintiff’s ownership or right to
24 possession of the property; (2) the defendant’s conversion by wrongful act
25 inconsistent with the property rights of the plaintiff, and (3) damages. *In re Emery*,
26 317 F.3d 1064, 1069 (9th Cir. 2003). Trustee argues that Appellant’s allegation that
27 Trustee “interfered” with his right to possession is insufficient to state a claim for
28 conversion. Specifically, Trustee states that Appellant does not allege Trustee

1 *converted* the property to his own use, but merely that he “failed to board up” the
2 house after the eviction, which led to the loss of Appellant’s personal property.
3 Further, Trustee claims that there was no wrongful act by Trustee since the eviction
4 was pursuant to the Sale Order.

5 Plaintiff’s allegations are insufficient to state a claim for conversion. Appellant
6 does not allege that Trustee exercised control over the personal property or applied it
7 to his own use. Indeed, the cross complaint alleges that the property was stolen by
8 outsiders, revealing that Trustee did not apply the personal property to his own use.
9 (AER Ex. 1 at 7.) Further, the Sale Order authorized Trustee to evict Appellant and
10 other occupants if still present after June 7, 2016, and authorized the Trustee to move
11 personal property to a moving truck. (DER Ex. 129 at 4,691–92.) Thus, any exercise
12 of control over the Property by way of eviction, or over Appellant’s personal property
13 if moved into a moving truck, would not have been wrongful. Regardless, it does not
14 appear that Trustee actually assumed control or ownership over Appellant’s personal
15 property, since the option to hire a moving truck was not exercised. Neither does
16 failing to board up the missing windows and doors constitute a “wrongful act” by
17 Trustee. The windows and doors were missing prior to Appellant’s eviction, and
18 Appellant advances no support for his contention that Trustee should have improved
19 the Property by making such replacements following the eviction. Accordingly, the
20 Court **AFFIRMS** the dismissal of Appellant’s conversion claim.

21 **D. Appellant’s Slander and Defamation Claims**

22 Appellant asserted a claim for defamation and slander per se as his fifth claim
23 for relief in his original counter claim. (AER Ex. 1 at 8.) This claim was dismissed
24 without prejudice, and Plaintiff’s amended counter claim asserted slander and
25 defamation as the first and second claims, respectively. (*See Simons v. Slaieh*, Adv.
26 No. 6:16-ap-01224-MH, Dkt. No. 39.) To prevail in a defamation claim under
27 California law, a plaintiff must allege “(a) a publication that is (b) false, (c)
28 defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that

1 causes special damage.” *Bowen v. McCaratan, Inc.*, 142 F. Supp. 3d 1007 (E.D. Cal.
2 2015). “Publication means communication to a third person who understands the
3 defamatory meaning of the statement and its application to the person to whom
4 reference is made.” *Arikat v. JP Morgan Chase*, 430 F. Supp. 2d 1013, 1020 (N.D.
5 Cal. 2006). Similarly, Slander is a false and unprivileged publication, orally uttered
6 which—as relevant here—charges any person with a crime, or with having been
7 indicted, convicted, or punished for a crime. *See* Cal. Civ. Code § 46 (1945).

8 The bankruptcy court originally dismissed Appellant’s defamation and slander
9 claim because he failed to plead publication. (DER Ex. 164 at 8,058.) Although
10 Appellant’s amended counter claim cured the pleading defect as to the slander claim,
11 the court found that Trustee was entitled to quasi-judicial immunity for this claim.
12 (DER Ex. 177 at 8,752–54.) The court also held that Appellant did not have standing
13 to assert his second defamation claim, which appeared to be based on slander of Ms.
14 Fraleigh. (*Id.* at 8,752.)

15 “Bankruptcy trustees are entitled to broad immunity from suit when acting
16 within the scope of their authority and pursuant to a court order.” *In re Harris*, 590
17 F.3d 730, 742 (9th Cir. 2009). “Additionally, court appointed officers who represent
18 the estate are the functional equivalent of a trustee.” *Id.* For quasi-judicial immunity
19 to apply, the defendants must show: (1) their acts were within the scope of their
20 authority; (2) the debtor had notice of their proposed acts; (3) they candidly disclosed
21 their proposed acts to the bankruptcy court; and, (4) the bankruptcy court approved
22 their acts. *Id.*; *see also In re Jacksen*, 105 B.R. 542, 545 (B.A.P. 9th Cir. 1989)
23 (holding a trustee has immunity for actions “within the scope of the authority
24 conferred upon him by statute or the court”).

25 Trustee asserts immunity under the theory that bankruptcy trustees are entitled
26 to quasi-judicial immunity for actions that are integrally related to the adjudication of
27 the bankruptcy case. *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th
28 Cir. 1986) (“[A] trustee in bankruptcy . . . is entitled to derived judicial immunity

1 because he is performing an integral part of the judicial process.”). Appellant argues
2 that the Supreme Court’s decision in *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429
3 (1993), redirects our inquiry away from whether actions performed by nonjudicial
4 officers are integrally related to the judicial process to an examination of the nature of
5 those functions. Appellant contends that the trustee is only immune for actions that
6 are functionally comparable to those of judges, i.e., those functions that involve
7 discretionary judgment. *Antoine*, 508 U.S. at 436. Appellant concedes that a
8 bankruptcy trustee would enjoy absolute quasi-judicial immunity for judicial functions
9 involving the exercise of discretionary judgment, but argues that the acts performed
10 here were extraneous to and not “in any way related to the judicial process.” (AOB at
11 35.) Trustee, as the proponent of the claim of immunity, bears the burden of
12 establishing that such immunity is justified. *Antoine*, 508 U.S. at 432.

13 All four elements required to establish quasi-judicial immunity are satisfied
14 here. First, as the bankruptcy court noted, all of Trustee’s actions related to the sale of
15 the Property and Appellant’s eviction were within the scope of Trustee’s duties. One
16 of Trustee’s primary duties under 11 U.S.C. § 704(a)(1), is to “collect and reduce to
17 money the property of the estate for which the trustee serves.” Accordingly, Trustee’s
18 attempt to sell the Property pursuant to the Sale Order was within the scope of his
19 statutorily conferred authority as trustee. Additionally, the Sale Order authorized
20 Appellant’s eviction, and therefore, any acts by Trustee in an attempt to evict
21 Appellant would also be within the scope of his authority. The allegedly defamatory
22 statements were made by Trustee and his professionals in their effort to evict
23 Appellant and effectuate the Sale Order. Inquiry regarding missing Estate property—
24 the windows and doors—was proper given Trustee’s duty to be accountable for all
25 property received. *See* 11 U.S.C. § 704; *see also In re Cedar Funding, Inc.*, 419 B.R.
26 807, 822 (B.A.P. 9th Cir. 2009) (holding that trustee was immune from claim for
27 slander where allegedly defamatory statements were made while performing his
28 official statutory duties). As the bankruptcy court stated, “[h]ere, the allegedly

1 defamatory statements were made in direct response to the disappearance of estate
2 property, the sale of which had been authorized pursuant to Court order, and the
3 disappearance of which was the sole responsibility of the Trustee to investigate.”
4 (DER Ex. 177 at 8,754.) Thus, the first element is satisfied.

5 Second, Appellant clearly had notice of Sale Order and pending eviction.
6 Appellant opposed and attempted to appeal the Sale Oder, and was given notice of the
7 eviction via the Sale Order and the eviction notice posted on the property. To the
8 third and fourth elements, Trustee candidly disclosed to the bankruptcy court its
9 proposed actions and the court approved and issued the Sale Order. Therefore, all
10 four elements are satisfied. Accordingly, because the Court finds that all four
11 requirements are met, and that the statements at issue were made during Trustee’s
12 attempt to prosecute the Sale Order—an act “essential to the authoritative adjudication
13 of private rights to the bankruptcy estate”—it **AFFIRMS** the dismissal of Appellant’s
14 defamation and slander claims on quasi-judicial immunity grounds. *See In re*
15 *Castillo*, 297 F.3d 940, 951 (9th Cir. 2002).

16 **E. Appellant’s Sixth Claim for Negligence**

17 With this claim, Appellant argues that Trustee’s failure to board up the missing
18 windows and doors constituted negligence. (AER Ex. 1 at 9.) In California, the
19 elements of negligence are (1) a legal duty to use due care, (2) breach of that duty, and
20 (3) the breach as the proximate or legal cause of the resulting injury. *Ladd v. Cnty. of*
21 *San Mateo*, 12 Cal. 4th 913, 917 (1996.) The bankruptcy court dismissed this claim
22 on the grounds that Appellant cited no authority for his proposition that Trustee owed
23 him a duty to replace windows and doors following the eviction, and because the only
24 damages alleged are to Ms. Fraleigh. (DER Ex. 164 at 8,059; *see also* AER Ex. 1 at
25 10)

26 First, Trustee argues that his duties under 11 U.S.C. §§ 323(a) and 704 are to
27 the Estate, not to Appellant. (AB at 24.) On the other hand, Appellant contends that
28 because Trustee was the owner of the real Property, he had a duty to protect the

1 personal property left inside the home. (AOB at 23.) Appellant also asserts that
2 Trustee had a duty to be accountable for all property *received*, and as a beneficiary of
3 the Estate, Appellant was owed this duty. (*Id.*)

4 First, the Court notes that the only damages alleged in the counter complaint are
5 Ms. Fraleigh's damages. As explained above, Appellant lacks standing to assert Ms.
6 Fraleigh's claims. But, even assuming Appellant's allegations can be construed as
7 pleading his own damages, Appellant has failed to show that Trustee owed him a duty
8 to "board up" the Property. A trustee is charged primarily with conserving estate
9 assets and maximizing distributions to creditors. *See In re Rigden*, 795 F.2d 727, 730
10 (9th Cir. 1986.) "When a debtor retains an interest in estate assets—either by properly
11 claiming exemptions or because surplus property will remain in the estate after all
12 creditors have been compensated—the trustee owes a fiduciary duty to the debtor as
13 well." *Wisdom v. Gugino*, 649 Fed. App'x 583, 584 (9th Cir. 2016) (citing U.S. Dep't
14 of Justice, Executive Office for the United States Trustees, *Handbook for Chapter 7*
15 *Trustees* 4–2 (2012)). First, the personal property Appellant complains was stolen
16 was not part of the Estate. Thus, Trustee never assumed control over, or "received"
17 this property as part of the Estate. Contrary to Appellant's contention, the Sale Order
18 does not state that Trustee *should* rent a U-Haul to remove personal property; as noted
19 above, the order merely authorized Trustee to do so in order to effectuate the eviction.
20 (DER Ex. 129 at 4,691–92.) Accordingly, even if Trustee owed Appellant a fiduciary
21 duty in this case, it was as to his interest in surplus *estate* property, not as to personal
22 property abandoned following eviction. Therefore, the Court **AFFIRMS** the
23 dismissal of Appellant's negligence claim.

24 **F. Appellant's Seventh Claim for Breach of Fiduciary Duty**

25 A claim for breach of fiduciary duty requires the following elements be shown:
26 (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damages.
27 *Gutierrez v. Girardi*, 194 Cal. App. 4th 925, 932 (Ct. App. 2011). As noted above,
28 bankruptcy trustees do owe fiduciary duties to the estate and creditors, and in some

1 situations, to the debtor. *See also In re Stoll*, 252 B.R. 492, 495 (B.A.P. 9th Cir.
2 2000). Here, Appellant asserts that Trustee and his professionals breached their
3 fiduciary duties “by doing all of the acts and omissions herein alleged.” (AOB at 10.)

4 First, to the extent Appellant is attempting to assert this claim on behalf of Ms.
5 Fraleigh and the estate, the claim fails for lack of standing. *See In re Stoll*, 252 B.R. at
6 495 (“Only a trustee may pursue a cause of action belonging to the bankruptcy
7 estate.”) Thus, to plead breach of fiduciary duty, Appellant must first assert facts
8 sufficient to show *he* was owed a duty by Trustee. Appellant has failed to do so.
9 Appellant has not pleaded that he retained an interest in estate assets or that there
10 would be surplus property after all creditor’s claims were satisfied. Further, section
11 704 does not contain the extensive duties Appellant claims are owed to him and Ms.
12 Fraleigh. (*See* AER Ex. 1 at 10 (stating that trustee “owed cross-claimants a fiduciary
13 duty to act at all times in good faith and in [their] best interest” and had a duty “to act
14 in Ms. Fraleigh’s highest best interests at all times”).) Even assuming the general
15 allegations in the amended cross complaint are sufficient to establish the existence of
16 a fiduciary duty, Appellant has not properly pleaded breach. The unclear statement
17 that Trustee breached his duty by committing all acts alleged in the cross complaint is
18 insufficient given that none of Appellant’s other claims are sufficiently pled.
19 Moreover, Appellant has not explained how any of these alleged acts would result in a
20 breach of the fiduciary duties owed specifically to him as a debtor, and not to the
21 estate generally. Accordingly, the Court **AFFIRMS** the dismissal of Appellant’s
22 breach of fiduciary duty claim.

23 **G. Appellant’s Eighth Claim for Violation of California Business and**
24 **Professions Code Section 17200**

25 California Business and Professions Code section 17200 states:

26 As used in this chapter, unfair competition shall mean and include any
27 unlawful, unfair or fraudulent business act or practice and unfair deceptive,
28 untrue or misleading advertising and any at prohibited by Chapter 1

(commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

In his amended cross complaint, Appellant again contends that the “acts alleged herein” including “(a) Breach of Contract, (b) Extortion; (c) Conversion; (d) breach of fiduciary duties, (e) Breach of B & P Code section 17200, et seq.; and (f) Negligence” form the basis of this claim. (AER Ex. 1 at 12.)

The bankruptcy court found this claim “redundant in that [Appellant] argues that the other causes of action form the basis for this cause of action.” (DER Ex. 164 at 8,061.) The court also noted that the causes of action relied upon lacked merit or were barred by Trustee’s quasi-judicial immunity, and the actions allegedly committed by Trustee “are not plausibly considered a ‘business act or practice’ within the meaning of the statute.” (*Id.*) In his Opening Brief, Appellant again asserts that the above-listed claims form the basis of this claim.

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999), the court warned that that the breadth of § 17200 does not give a plaintiff license to “plead around” the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition. This is what Appellant has attempted to do with his section 17200 claim. Since all of his other claims against Trustee cannot proceed due to substantial pleading, standing, or immunity issues, the same allegations cannot form the basis of an unfair competition claim.

Further, “a common law violation such as breach of contract is insufficient” on its own to support a claim under the unlawful prong of section 17200. *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1044 (9th Cir. 2010). Thus, the allegations advanced by Appellant that are based on common law violations are insufficient to support a finding of unlawfulness, and the only statutory causes of action alleged are extortion and defamation. As analyzed above, these claims fail for lack of standing or because of Trustee’s quasi-judicial immunity. Accordingly, Appellant cannot attempt

1 to recast those insufficient allegations as a claim under section 17200.

2 Lastly, the amended cross complaint lacks allegations to support the conclusion
3 that the alleged conduct was unfair or fraudulent. California Courts of Appeal are
4 split as to the test for what constitutes an unfair business practice. *See Drum v. San*
5 *Fernando Valley Bar Ass’n*, 182 Cal. App. 4th 247 (Ct. App. 2010) (internal citations
6 omitted) (describing three tests courts use when analyzing the unfair prong in actions
7 involving consumers). In his amended cross complaint, Appellant states that Trustee
8 engaged in deceptive practices with respect to the administration of the Estate and
9 conspired to defraud Appellant. (AER Ex. 1 at 12.) However, Appellant does not
10 assert any specific allegations with respect to how Trustee’s administration of the
11 Estate was unlawful, unfair, or fraudulent. Trustee’s act of marketing the property for
12 sale and evicting Appellant was done pursuant to the Sale Order and was not unlawful
13 or unfair. As to whether the acts were fraudulent, Appellant essentially relies on the
14 allegations in his other claims. *See Grant v. Pensco Tr. Co.*, No. 12-cv-06084-WHO,
15 2014 WL 1471054, at *6 (N.D. Cal. Apr. 15, 2014) (granting motion to dismiss UCL
16 claim when plaintiff did not include any specific allegations regarding the unfair
17 prong and simply incorporated breach of contract allegations); *Bank of the West v.*
18 *Superior Court*, 2 Cal. 4th 1254, 1267 (1992) (noting that fraudulent conduct
19 “requires a showing [that] members of the public ‘are likely to be deceived’”). These
20 allegations are insufficient to state a claim under section 17200.

21 Accordingly, the Court **AFFIRMS** the dismissal of Appellant’s section 17200
22 claim.

23 **H. Appellant’s Ninth Claim for Intentional Infliction of Emotional Distress**

24 A cause of action for intentional infliction of emotional distress (“IIED”) exists
25 where there is “(1) extreme and outrageous conduct by the defendant with the
26 intention of causing, or reckless disregard of the probability of causing, emotional
27 distress, (2) the plaintiff’s suffering severe or extreme emotional distress; and (3)
28 actual and proximate causation of the emotional distress by the defendant’s

1 outrageous conduct.” *Hughes v. Pair*, 46 Cal. 4th 1035, 1050 (2009). Appellant
2 asserts that Trustee’s alleged fraud, extortion and defamation was extreme and
3 outrageous, done intentionally, and caused him and his family to suffer severe
4 emotional distress. (AER Ex. 1 at 14–15; AOB at 32.) Specifically, Appellant alleges
5 that Trustee should have known that refusing to comply with the alleged purchase
6 agreement would likely cause severe emotional distress. (AER Ex. 1 at 15.) Trustee
7 argues Appellant lacks standing to assert this claim because the allegations concern
8 Ms. Fraleigh’s alleged distress. (AB at 29.)

9 Under California law, an action must be intentional or reckless to serve as the
10 basis for an intentional infliction of emotional distress claim. It is not enough to
11 simply allege inaction on the part of the defendant. *See Spackman v. Good*, 245 Cal.
12 App. 2d 518, 530 (1966). Since Appellant’s claims for conversion, breach of
13 fiduciary duty, and negligence are all based on the alleged failure to board up the
14 Property, the allegations supporting these causes of action cannot serve as the basis for
15 his IIED claim. Appellant has failed to allege facts to show that any of the other
16 alleged wrongs, i.e., breach of contract, slander, or extortion, were done in order to
17 cause, or with reckless disregard for the possibility of causing, severe emotional
18 distress. Indeed, the alleged defamatory statements were geared at discovering
19 information relating to missing Estate property. As to the alleged act of extortion,
20 Appellant has failed to provide facts that show Trustee extorted Ms. Fraleigh with the
21 intent of causing *Appellant* severe emotional distress; indeed, it is not clear that
22 Appellant was even present when the alleged demand was made. Lastly, there are no
23 facts relating to the alleged breach of contract that show that it was done to cause
24 severe emotional distress or with reckless disregard thereto.

25 Further, for conduct to be outrageous, it must be “so extreme as to exceed all
26 bounds of that usually tolerated in a civil society.” *King v. AC & R Advertising*, 65
27 F.3d 764, 769 (9th Cir. 1995). Basically, Appellant contends that it was outrageous of
28 Trustee to engage in the other alleged wrongs. However, Appellant’s allegations are

1 insufficient in that they do not state what specific acts were outrageous under this
2 standard. Accordingly, the Court **AFFIRMS** the dismissal of Appellant's IIED claim.

3 **I. Appellant's Tenth Claim for Wrongful Eviction**

4 Lastly, Appellant argues that he was wrongfully evicted because Trustee did not
5 follow state eviction laws. (AER Ex. 1 at 16.) However, as the bankruptcy court
6 noted, state eviction laws do not apply after a bankruptcy court enters an order
7 directing surrender of the property. *See George v. Cnty. of San Luis Obispo*, 78 Cal.
8 App. 4th 1048 (Ct. App. 2000) ("State unlawful detainer law does not apply, and the
9 state must defer to the federal order of the bankruptcy court directing immediate
10 surrender of the premises.") Accordingly, this claim was properly dismissed.

11 Appellant also alleged that the order to sell the Property was based on fraud and
12 misrepresentation by Trustee. However, Appellant provides no factual allegations
13 with respect to what conduct Trustee engaged in procuring the Sale Order. Moreover,
14 Appellant was unsuccessful in his attempt to appeal the Sale Order, and cannot use
15 these bare allegations in an effort to collaterally attack that outcome. Lastly, based on
16 the above analysis of Trustee's quasi-judicial immunity, Trustee is immune from this
17 claim as the eviction was within the scope of Trustee's duties, was disclosed to
18 Appellant and the court, and approved by the court. *See infra* Section III.E. Thus, the
19 Court **AFFIRMS** the dismissal of Appellant's wrongful eviction claim.

20 **J. Dismissal With Prejudice**

21 Lastly, the Court finds dismissal with prejudice was appropriate. Leave to
22 amend may be denied where there has been a repeated failure to cure the deficiencies
23 by amendment previously allowed, or where amendment would be futile. *See Forman*
24 *v. Davis*, 371 U.S. 178, 182 (1962). Here, it would have been futile to allow
25 Appellant leave to amend claims for which he lacked standing, and from which
26 Trustee is immune. Thus, Appellants extortion, defamation, and wrongful eviction
27 claims were properly dismissed without leave to amend. As to the remaining claims,
28 Appellant had multiple opportunities to present these claims, and he continually failed

1 to state a prima facie case. (*See* DER Ex. 164 at 8,064.) For these reasons, dismissal
2 with prejudice was appropriate.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court **AFFIRMS** the bankruptcy court's order
5 dismissing with prejudice Appellant's counter claims.

6 **IT IS SO ORDERED.**

7
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9 Dated: January 16, 2018



10 HONORABLE ANDRÉ BIROTTE JR.
11 UNITED STATES DISTRICT COURT JUDGE

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13 CC: Bankruptcy Court and BAP
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